S T A T E O F M I C H I G A N

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of **CONSUMERS ENERGY COMPANY** for authority to reconcile its renewable energy plan costs associated with the plan approved in Case No. U-15805	)))))	Case No. U-16300

NOTICE OF PROPOSAL FOR DECISION

The attached Proposal for Decision is being issued and served on all parties of record in the above matter on June 27, 2011.

Exceptions, if any, must be filed with the Michigan Public Service Commission, P.O. Box 30221, 6545 Mercantile Way, Lansing, Michigan 48909, and served on all other parties of record on or before July 13, 2011, or within such further period as may be authorized for filing exceptions. If exceptions are filed, replies thereto may be filed on or before July 25, 2011. **The Commission has selected this case for participation in its Paperless Electronic Filings Program. No paper documents will be required to be filed in this case.**

At the expiration of the period for filing exceptions, an Order of the Commission will be issued in conformity with the attached Proposal for Decision and will become effective unless exceptions are filed seasonably or unless the Proposal for Decision is reviewed by action of the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due.

MICHIGAN ADMINISTRATIVE HEARING SYSTEM
For the Michigan Public Service Commission

Mark Cummins

Digitally signed by Mark Cummins
DN: cn=Mark Cummins, c=US, email=cumminsm1@michigan.gov
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Mark E. Cummins
Administrative Law Judge

June 27, 2011
Lansing, Michigan

STATE OF MICHIGAN

MICHIGAN ADMINISTRATIVE HEARING SYSTEM

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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PROPOSAL FOR DECISION

I.

HISTORY OF PROCEEDINGS

The Commission's May 26, 2009, order in Case No. U-15805 approved Consumers Energy Company's (Consumers) Renewable Energy Plan (REP).[1] On June 30, 2010, Consumers filed an application requesting authority to reconcile its REP costs with the surcharges collected from August 27, 2009 through December 31, 2009, pursuant to 2008 PA 295, MCL 460.1001, et seq. (Act 295).

Pursuant to due notice, a prehearing conference was held on September 14, 2010, before Administrative Law Judge Mark E. Cummins (ALJ), at which the ALJ granted intervenor status to the Michigan Environmental Council and Environmental Law and Policy Center (MEC/ELPC), and the Michigan Department of Attorney General (Attorney General). The Commission Staff (Staff) also participated in the proceedings.

[1] On February 24, 2011, Consumers filed an application for approval of an amended REP to become effective in September, 2011. See, Case No. U-16543. That application was approved, subject to various changes in the amended REP as required by the Commission, on May 10, 2011.

Evidentiary hearings were conducted in this matter on February 23, 2011. In the course of those hearings, testimony was provided on behalf of Consumers by three witnesses, namely Thomas P. Clark, David F. Ronk, Jr., and James P. Schwanitz. The intervenors offered testimony from one witness each, with Michael J. McGarry, Sr. testifying for the Attorney General and George E. Sansoucy on behalf of MEC/ELPC. Testimony was also provided by Katherine Trachsel and Jesse J. Harlow on behalf of Staff.

The resultant record consists of 131 pages of transcript and 15 exhibits, each of which was received into evidence. Pursuant to the schedule established for this case, each of the parties filed briefs and reply briefs on March 17 and April 1, 2011.

II.

TESTIMONY AND POSITION OF THE PARTIES

As noted earlier, Consumers offered testimony from three witnesses in this proceeding. Primary among these was Mr. Ronk, the utility's Director of Electric Transactions and Resource Planning, who provided a summary of the Company's efforts to comply with the requirements of Act 295, and who further outlined Consumers' proposed treatment of the recent upgrade to the Hardy Hydroelectric Generating Station's Unit 3 (Hardy Unit 3), which was being undertaken at the time that Act 295 took effect. Specifically, Mr. Ronk described: (1) the expenses incurred during 2009 associated with the utility's REP, which he calculated to be $5,654,748; (2) the total revenues received throughout that year--in the amount of approximately $25.6 million--via application of its renewable energy surcharge; (3) the level of 2009 REP costs—namely, $90,973--designated for recovery through the Power Supply Cost Recovery

(PSCR) process, as opposed to those to be recovered through the REP process as incremental costs of compliance with Act 295; (4) the estimated number of jurisdictional and non-jurisdictional renewable energy credits--referred to as RECs--Consumers will acquire as a result of its sales of renewable energy during 2009; and (5) the rationale behind the utility's proposal to assign to the Company RECs--albeit subject to the 50% cap set forth in Section 33(1)(a) of Act 295--that Consumers contends are deserved due to its upgrade of Hardy Unit 3. See, 2 Tr 35-40. Mr. Ronk also provided rebuttal testimony intended to counter the proposed treatment of certain wind-power-related capitalized costs suggested by MEC/ELPC, the Staff's recommended treatment of alleged REP costs incurred prior to the effective date of Act 295, and the Attorney General's recommended calculation of the transfer price at which renewable energy is assigned for collection through the utility's PSCR process. See, Id., at 43-52.

Another of Consumers' witnesses was Mr. Schwanitz, a Senior Analyst in the utility's General Accounting Group. Mr. Schwanitz's direct testimony focused on the accounting process associated with the company's REP, by which he concluded that the company had accumulated $8,342,588 in recoverable capitalized costs and an additional $639,360 in related carrying charges. See, 2 Tr 54-56, and Exhibit A-7. Moreover, he offered rebuttal testimony asserting that the Staff's presentation in this case (1) "incorrectly deducted" from the over-recovery balance $11,458 in expenses, and (2) erroneously disallowed $2.4 million of REP-related "capital expenditures incurred prior to October 2008," which in turn "incorrectly reduced" the corresponding interest the Company earned by $327,800. 2 Tr 59-60.

The third and final witness presented by Consumers was Mr. Clark, an Engineer in the Transaction and Resource Planning Section within Consumers' Energy Supply Operations Department. The focus of Mr. Clark's testimony was to explain the calculation of the per megawatt hour (MWh) transfer price[2] arising from the renewable

[2] According to Mr. Clark, the phrase "transfer price" was fully defined by the Commission by way of its December 4, 2008 Temporary Order in Case No. U-15800 (Temporary Order). Specifically, he cites to the following language:

> 4. Calculation of the incremental costs of compliance via the transfer price to be recovered through the PSCR clause.
>
> A provider whose rates are regulated by the Commission shall include in its renewable energy plan an estimate over the 20-year plan-period of the revenues derived from the sale of energy and capacity generated by renewable energy systems owed by the provider. Energy and capacity produced by these systems may be sold into the wholesale market, or may be sold directly to the provider's customers.
>
> Section 47 requires the Commission to annually set the price per megawatt hour to be transferred to retail customers through the regulated provider's power supply cost recovery (PSCR) clause. Section 49 requires the transfer price to be established in the context of an annual renewable cost reconciliation proceeding. Because the 2009 renewable energy plan proceedings will precede the first annual renewable energy reconciliation, the plan filings will need to estimate the transfer prices over the 20-year plan period. All renewable engineering, procurement, and construction contracts, or contracts for renewable energy systems that have been developed by third parties for transfer of ownership to an electric provider, that have been reviewed and approved by the Commission in a particular year will have the transfer price established as a floor for the lifecycle of the project. Provider-owned projects will have transfer prices set in vintages. Doing so ensures that the economic viability of projects that have been committed to will not be jeopardized by transfer prices that change in future years.
>
> In a renewable energy plan, PSCR transfer revenues are subtracted from the total cost of compliance, as determined by Section 47(2)(a). The transfer price is a primary determinant of the incremental cost of compliance. The PSCR transfer price:
>
> (a) is unique to each provider;
> (b) reflects the value of long-term capacity and energy;
> (c) is not the current MISO market price of energy, but may use historical MISO prices as a starting point for a 20-year projection of the value of renewable energy and capacity;
> (d) need not be tied to the avoided price of a new conventional coal-fired facility; and
> (e) other factors determined relevant by the Commission.
>
> The transfer price may be separately calculated for differing renewable technologies to reflect availability and the value of capacity; e.g., the capacity value of a landfill gas facility may differ from the capacity value of a wind farm.
>
> The PSCR transfer price may be adjusted by an hourly distribution curve to yield an hourly price per megawatt hour for the 8,760 hours per year.

2 Tr 21-22; citing the Temporary Order at pages 25-26.

energy generated in accordance with the utility's REP, as well as to describe the level of RECs obtained from the Company's operation of its REP during 2009.

Specifically, Mr. Clark testified that--based on the language quoted in footnote 2, supra--the transfer price is determined by calculating the total "transfer cost" and dividing that figure by the corresponding eligible renewable energy quantity (measured in MWh) actually delivered to the utility during 2009. 2 Tr 22. He further testified that the transfer cost is the total cost of renewable generation obtained in accordance with MCL 460.1033 that Consumers will recover as part of its power supply cost recovery (PSCR) expense, pursuant to MCL 460.1047(2)(b)(iv). See, 2 Tr 23. To this end, he represented that, during 2009, Consumers had three renewable energy purchase agreements supplying the utility energy, capacity, and RECs, all in accordance with MCL 460.1033(1)(b). Those agreements involved the Elk Rapids Hydroelectric, Scenic View Dairy-Freeport, and Zeeland Farm Services-Plant 2 facilities. See, Exhibit A-1. These are the only counterparties from which Consumers received renewable energy or renewable energy capacity for which costs were booked in 2009. 2 Tr 24; See also, Exhibit A-1 col. (a). According to Mr. Clark, the total transfer cost for 2009 was $90,973 ($1,221 in total capacity transfer costs, $54,647 in on-peak energy transfer costs, and $35,105 in off-peak energy transfer costs). See, id., Exhibit A-1, col. (k). This total was divided by the 2030.739 MWh of total energy delivered, both on-peak and off peak, as set forth in Exhibit A-1, cols. (c) and (d). Based on this calculation, Mr. Clark asserted that the Commission should establish a transfer price of $44.80 per MWh ($90,973 ÷ 2030.739 = $44.80) for 2009. See, 2 Tr 26.

Mr. Clark further indicated that, because the total cost of supply to Consumers was $168,980 and the total transfer cost was $90,973, the utility had an incremental

cost of compliance to be recovered through the REP process of $78,007. See, Exhibit A-1 cols. (k), (l), and (m). Finally, he testified that the company is estimated to receive "approximately 1,559,941 RECs for renewable energy generated or acquired for jurisdictional retail sales in 2009."[3] 2 Tr 27.

Based on the testimony supplied by these three witnesses, Consumers contends that the Commission should, among other things: (1) conclude that the utility's 2009 REP is reasonable and prudent, and that it meets all relevant requirements under Act 295; (2) find that the company's transfer price for renewable energy and advanced cleaner energy costs recovered through the PSCR process should be $44.80 per MWh; (3) approve Consumers' proposed financial treatment of the upgrade to Hardy Unit 3; and (4) reject all assertions by the Staff and intervenors to the effect that miscellaneous changes and cost disallowances should be adopted in this proceeding.

The Attorney General's sole witness was Mr. McGarry, President and CEO of Blue Ridge Consulting Services, Inc., who testified in opposition to Consumers' methodology for calculating the transfer price. Mr. McGarry suggested that a utility should not transfer to a PSCR reconciliation any portion of actual renewable energy expense that exceeds the costs it would have incurred if the utility had dispatched available, alternative, and more economic energy. See, 2 Tr 78. He pointed out that, to establish the transfer price, the Commission should consider factors including projected capacity, energy, maintenance, and operating expenses; information filed under Section 6j of 1939 PA 3, MCL 460.6 et seq., (Act 304); and "information from wholesale markets, including, but not limited to, locational marginal pricing (LMP)." 2 Tr 82. In his

[3] In addition to the RECs arising from jurisdictional sales as described by Mr. Clark, Mr. Ronk testified that Consumers "also estimates that it will receive approximately 15,881 RECs associated with non-jurisdictional sales in 2009." 2 Tr 38.

opinion, the amount of dollars that should flow out of the annual REP and into the annual PSCR process should be based on the lower of the actual price for renewable energy or the LMP price. See, 2 Tr 87.

Based on the testimony supplied by his witness, the Attorney General contends that the total renewable energy expense transferred to Consumers' 2009 PSCR process from the REP should be reduced by $39,714.59 (from the utility's proposed level of $90,973.00 to $51,258.41). According to the Attorney General, his recommended change reflects application of Mr. McGarry's more reasonable transfer price of $24.64 per MWh. He therefore asserts that the $39,714.59 difference should be rolled back into the present REP proceeding, thus "increasing [Consumers'] 2009 incremental costs of compliance [with Act 295] to $117,973." Attorney General's initial brief, p. 15.

As for the Staff, the first of its two witnesses was Ms. Trachsel, an auditor in the Renewable Energy Section of the Commission's Electric Reliability Division who was responsible for reviewing the utility's reconciliation in light of Act 295, the REP adopted in the company's plan case, and the Commission's Temporary Order issued in Case No. U-15800. According to Ms. Trachsel, two adjustments[4] were needed to Consumers' proposed reconciliation. First, she recommended disallowing a total of $2,432,207 in REP-related capital expenditures made during July, August, and September 2008, as well as $327,800 in associated carrying costs. See, 2 Tr 118. Ms. Trachsel's basis for this recommendation was that, because those costs were incurred in advance of the October 6, 2008 effective date for Act 295, they do not meet the criterion for recovery as

[4] A third potential revision mentioned by Ms. Trachsel (in which she proposed correcting what was initially believed to be a mathematical error on line three of the Company's Exhibit A-8), appears to have arisen from a simple misunderstanding regarding the $11,458 adjustment reflected on Exhibit A-6 and addressed in Mr. Schwanitz's rebuttal testimony. See, 2 Tr 60, and 117-119; Consumers' initial brief, p. 10. Because this issue was not raised in either of the Staff's briefs, the ALJ is left to believe that the Staff either accepted the utility's explanation or elected to abandon the issue for some unstated reason. As a result, it will not be directly addressed in this Proposal for Decision (PFD).

set forth by the Commission in the Temporary Order. See, 2 Tr 117-118. Second, she took issue with Consumers' proposal to treat the upgraded portion of Hardy Unit 3 as having been in commercial operation since before the enactment of Act 295, despite the fact that the upgrade was not completed until March 3, 2009. See, 2 Tr 119-120. According to her, the appropriate way to treat the upgraded portion of that unit (and its associated 1.52 megawatts of electric capacity) would be as "a renewable energy system whose operating date was effective after the date of the Act," thus allowing the RECs arising from that generation to be included as meeting the standard set forth in Section 33(1)(a) of Act 295. See, 2 Tr 120.

Mr. Harlow, an engineer in the Renewable Energy Section of the Commission's Electric Reliability Division and the Staff's second witness, offered rebuttal testimony in support of Consumers' proposed transfer price calculation. Mr. Harlow began by noting that the purpose of the transfer price mechanism is to allow electric providers to recover their costs for renewable energy and capacity, while also staying under the surcharge caps defined in Act 295, "by establishing a schedule that sets the floor for recovery for each calendar year." 2 Tr 127. He further indicated that transfer price schedules are based on long-term market price projections for both energy and capacity, thus allowing the transfer price mechanism to provide a reasonable method for developing electric providers' REPs and for cost recovery related to renewable energy contracts and power purchase agreements (PPAs). See, 2 Tr 128-129.

Mr. Harlow disagreed with Mr. McGarry's position and, instead, pointed out that MCL 460.1047(2)(b)(iv) states that the transfer price is to "be considered a booked cost of purchased and net interchanged power" under section 6j of Act 304, and thus applied to the Company's PSCR expense for the year in question. 2 Tr 128. Moreover, he

noted that this section of Act 295 specifically describes the transfer price as "including, but not limited to, locational marginal pricing." Id. Mr. Harlow therefore contended that Mr. McGarry's position (to the effect that the PSCR recovery of costs associated with renewable energy PPAs should reflect the lower of the actual costs of the PPA or the LMP price for electricity) is in conflict with Act 295 itself. See, 2 Tr 128-129.

Based on the testimony of Ms. Trachsel and Mr. Harlow, the Staff concludes that: (1) all capital expenditures and their related carrying costs incurred prior to the effective date of Act 295 should be disallowed; (2) any RECs that are created due to the upgrade of Hardy Unit 3 should be included in the computation of whether Consumers had met the requirements of Section 33(1)(a) of Act 295; and (3) the Attorney General's position should be rejected, and the utility's proposed transfer price of $44.80 per MWh should be retained for use by the company.

The final witness to testify in this proceeding was Mr. Sansoucy, an engineer sponsored by MEC/ELPC. Mr. Sansoucy's testimony focused on three areas relating to Consumers' asserted costs for provider-owned wind-generated energy. Specifically, he expressed concern that: (1) the utility did not provide sufficient detail to demonstrate that the capitalized costs of the three wind generation facilities included in its REP portfolio were actually reasonably and prudently incurred; (2) the company may be recovering certain costs twice, once through its general electric rates and a second time via the REP process; and (3) the Commission should not approve a return on the capitalized costs arising from Consumers' three wind energy projects unless and until the utility can demonstrate the ability to generate renewable energy at a cost that is both reasonable and prudent. See, 2 Tr 65-68. Based on Mr. Sansoucy's presentation, MEC/LEPC requests, among other things, that the Commission should defer recovery

of the carrying charges for self-build wind projects until the full actual cost of each project is known, disallow all capital expenditures incurred through September 2008 (along with any related carrying charges), and defer recovery of "the carrying charges on internal Company costs for land development" by the utility's real estate department and "$1.7 million in capitalized costs for various labor by Consumers' employees for development of the Company's proposed wind farm projects" until it "demonstrates in a concrete and specific way" that such costs will not be recovered twice. MEC/ELPC initial brief, p. 12.

III.

DISCUSSION AND FINDINGS

The historical description provided by Consumers' witnesses as to what has occurred regarding the utility's REP, as well as the 2009 calendar year's impact of those occurrences, is not seriously disputed. As noted by the Attorney General:

> No party argues that [Consumers] did not meet the 2009 renewable portfolio standards . . . imposed by MCL 460.1027. No party argues that [the company's] actual 2009 renewable energy expenses and actual renewable energy revenues exceeded amounts authorized in [its] Case No. U-15805 [REP]. No party disputes the amount of . . . RECs claimed by [the utility] for 2009.

Attorney General's reply brief, p. 1.

Nevertheless, and as can be seen from the preceding section of this PFD, there remain five areas of dispute to be resolved. These consist of: (1) the proposed disallowance of any expenses, and the carrying costs arising from them, incurred prior to the effective date of Act 295; (2) the Staff's objection to Consumers' requested treatment of its recently-completed upgrade to Hardy Unit 3; (3) the Attorney General's assertion that the transfer price for all renewable energy to be recovered through

Consumers' PSCR clause should effectively be limited to the LMP; (4) MEC/ELPC's concern that certain land development costs and other expenses related to the company's wind energy projects were being recovered both in base rates and through the REP process; and (5) MEC/ELPC's request that the Commission refrain from approving any carrying charges associated with Consumers' wind generation projects unless and until the utility shows that the ultimate cost of that energy is reasonable and prudent. Each of these issues will be addressed seriatim.

Costs Incurred Prior to the Effective Date of Act 295

The first issue to address in this case is the Staff's proposed disallowance of all costs included in Consumers' alleged $8,352,588 of capitalized expenditures, along with any of their related carrying costs, arising from actions taken prior to the effective date of Act 295. Toward this end, Ms. Trachsel testified that $2,432,207 in capital expenses and $327,800 in carrying costs must be removed from the overall level of REP recovery currently sought by the utility. See, 2 Tr 118. According to the Staff, no obligation to even prepare, let alone start executing, an REP existed for any utility prior to when Act 295 took effect on October 6, 2008. See, Staff's initial brief, p. 6. Moreover, it notes, nothing in the statute itself provides for the recovery of any such pre-Act 295 costs. Finally, the Staff points out that although the Commission "was aware of the Capacity Needs Forum Report and Michigan's 21st Century Electric Energy Plan," both of which envisioned implementation of some type of renewable energy program for the state's utilities, it refrained from including in its Temporary Order any mention of cost recovery for planning or other efforts undertaken prior to the passage of Act 295. See, Id., at pp. 6-7.

The MEC/ELPC and the Attorney General each support the Staff's requested disallowance of all REP-related costs arising from actions taken by Consumers, and identified on Exhibit A-7, during July, August, and September 2008. According to the MEC/ELPC, "not only was there no approved [REP] when the costs in question were incurred, there was no statutory section authorizing recover of those costs, either." MEC/ELPC's initial brief, p. 6. Moreover, both it and the Attorney General note that any costs arising prior to the Act's October 6, 2008 effective date "are not eligible for recovery in this reconciliation because that would give Act 295 retroactive effect," and thus any Commission order allowing the same would "smack of retroactive ratemaking." Id.; Attorney General's reply brief, p. 5.

In response, Consumers contends that any assertion to the effect that the utility should not recover these costs "is not supported by [Act 295]." Consumers' initial brief, p. 10. In support of that contention, the utility cites Section 47 of the Act, which provides, in part, that:

> Subject to the retail rate impact limits under section 45, the commission **shall consider all actual costs reasonably and prudently incurred in good faith to implement a commission-approved renewable energy plan** by an electric provider whose rates are regulated by the commission **to be a cost of service to be recovered** by the electric provider.

Id.; citing MCL 460.1047(1) [Emphasis added]. The company further quotes from the Commission's Temporary Order, which states as follows:

> 5. Recovery of start-up costs incurred prior to plan approval. With respect to start-up costs incurred before Commission approval of a regulated provider's plan, the Commission finds guidance from Section 47(1) which states: "the commission shall **consider all actual costs reasonably and prudently incurred in good faith to implement a commission-approved [REP]** by an electric provider whose rates are regulated by the commission to be a cost of service to be recovered by the provider." In determining the rate impacts required to recover the incremental cost of compliance, the Commission intends to consider for cost recovery

> renewable energy plan start–up costs incurred *by a provider prior to the date off approval of the provider's plan.*"

Id., pp. 10-11; citing the Temporary Order at p. 26 [Emphasis added]. Based on the above-quoted language, Consumers contends that because "the costs included in its presentation were actual costs reasonably and prudently incurred in good faith to implement a Commission-approved [REP]," they should be eligible for recovery in this proceeding. Id., p. 11.

Consumers goes on to assert that "history adds context to this issue," and thus states as follows:

> In its October 14, 2004 Order in . . . Case No. U-14231, the Commission ordered Staff to convene a Capacity Needs Forum to assist in investigating the need for additional generation capacity, transmission upgrades, and other supply- and demand-side resources to supplement current Michigan-based generating facilities and out-of-state power sources. The Commission directed Staff to include renewable resources in its investigation. In its January 3, 2006 Report to the Commission, Staff recommended a portfolio including additional renewable resources that were projected to have beneficial effects for the Michigan economy.
>
> In Executive Directive No. 2006-02 Governor Granholm requested the development of Michigan's 21st Century Electric Energy Plan. In his January 31, 2007 Report to the Governor, the Chairman of the [Commission] recommended a statutorily required renewable energy portfolio standard to be implemented by the Commission requiring load serving entities to reach 10 percent of their energy sales from renewable energy options by the end of 2015. Over the next 20 months proposals for a renewable portfolio standard were debated in the legislature. Throughout those discussions, consensus developed indicating that a 10% renewable portfolio standard would be enacted.

Consumers' initial brief, pp. 11-12. Based on that background, the utility asserts it was "necessary and prudent for the Company to initiate [renewable energy] development activities in 2007 and 2008, prior to the effective date of Act 295," and that all costs stemming from those activities should be recoverable through the REP process. Id. at p. 12.

The ALJ does not find Consumers' arguments persuasive. As correctly noted by the Staff, MEC/ELPC, and the Attorney General, Consumers' had no obligation to even start preparing an REP until October 6, 2008. Moreover, despite being fully aware of both the Capacity Needs Forum and the 21st Century Electric Energy Plan, the Temporary Order issued by the Commission was clearly designed to merely allow for recovery of post-Act 295 (but, at least potentially, pre-REP approved) costs. Finally, nothing in the statute explicitly provides for the recovery of any pre-Act 295 costs. As such, based on the well-settled conclusion that "the Legislature's expression of an intent to have a statute apply retroactively must be clear, direct, and unequivocal as appears from the context of the statute itself," inadequate support exists for allowing Consumers to recover any REP-related costs that arose prior to Act 295's October 6, 2008 effective date. Davis v State Employees' Retirement Board, 272 Mich App 151, 155-156 (2006). It is therefore recommended that the Commission adopt the proposal, offered by the Staff and supported by both MEC/ELPC and the Attorney General, to disallow from recovery the $2,432,207 in capital expenses and $327,800 in related carrying costs incurred by the utility prior to the effective date of Act 295.

Treatment of Hardy Unit 3

Consumers completed its overhaul and upgrade of Hardy Unit 3 on March 3, 2009, thus increasing the unit's capacity by 1.52 megawatts (MW). 2 Tr 39. As part of its application, the utility "seeks Commission authorization to treat this facility as any other renewable energy system that was in commercial operation as of the effective date of Act 295." Application, p. 3, fn.1.

In support of that proposal, Consumers asserts that the power produced by Hardy Unit 3 "is consistent with the definition of 'renewable energy' as used in Act 295"

and, thus, should be viewed as providing RECs to the company. Consumers' initial brief, p. 8. Specifically, it asserts that: (1) the capital, operating, and maintenance costs associated with the upgraded portion of Hardy Unit 3 have already been included in the company's general rates as approved in Case No. U-15645, (2) no incremental cost of compliance with Act 295 will be forthcoming, and (3) work on the upgrade began on May 5, 2008, well before Act 295 took effect. See, Id., pp. 8-9. As a result, the utility continues, the Commission should view the upgrade as "a Renewable Energy System that was conceived and authorized prior to the enactment of [Act 295]," treat it "as any other renewable energy system that was in commercial operation" as of the Act's effective date, and therefore view the upgraded portion of the facility as generating RECs that are "not subject to the 'no more than 50% requirement of Section 33(1)(a) of Act 295." Id., p. 9.

The Staff objects to Consumers' proposal to "treat completion of the [1.52 MW] upgrade . . . as having been in commercial operation prior to [the effective date of Act 295], even though the upgrade was not completed until March 3, 2009." Staff's initial brief, p. 7. According to the Staff, such treatment conflicts with Section 27(2) of Act 295, which states as follows:

> (2) An electric provider's renewable energy capacity portfolio shall be calculated by adding the following:
>
> (a) The nameplate capacity in megawatts of renewable energy systems owned by the electric provider that were not in commercial operation before the effective date of this act.
> (b) The capacity in megawatts of renewable energy that the electric provider is entitled to purchase under contracts that were not in effect before the effective date of this act.

MCL 460.1027(2). Although the utility does not consider the costs associated with the upgrade as incremental costs of compliance with the Act, the Staff notes, that "does not

defeat the fact that the upgraded portion of [Hardy Unit 3] . . . was not in commercial operation before Act 295 was enacted." Staff's initial brief, p. 8. As a result, the Staff contends that the RECs created as a result of the Hardy Unit 3 upgrade do not qualify for the treatment the company now seeks.

The Attorney General agrees with the Staff on this issue. Specifically, he asserts that "the capital expenditures incurred by [Consumers] to upgrade the Hardy dam facility were not in service by the date set in Act 295 to qualify for [the] grandfathering exclusion from renewable energy costs" as provided for in the Act itself. Attorney General's reply brief, p. 6. As a result, he opposes the treatment sought by the utility with regard to the Hardy Unit 3's upgrade.

The ALJ agrees with the Staff and the Attorney General. Consumers concedes that the upgrade in question was not completed until after the date set in Act 295 to qualify for the grandfathering exception concerning the calculation of RECs. As a result, the clear language of Section 27(2) of the Act precludes the treatment requested by the utility. The ALJ therefore finds that the company's request for authorization to treat the upgrade to Hardy Unit 3 the same as any other renewable energy system that was in commercial operation as of the effective date of Act 295 must be denied.

Transfer Price

The next area of dispute in this matter stems from the Attorney General's assertion that the Commission should adopt what Consumers and the Staff both contend is an erroneous methodology for establishing the transfer price applied to all renewable energy and capacity included in a utility's PSCR expense. Specifically, the Attorney General asserts that, as suggested by Mr. McGarry:

> The price used by [Consumers] to transfer renewable energy costs from the [REP] to the PSCR process should be the applicable LMP prices unless approved actual renewable energy contract prices fall below those actual prices. In that case, the lower actual prices should be included in the calculation for renewable energy expenses transferred. The result of my analysis shows that the transferred renewable energy expense [which would be included in Consumers' 2009 PSCR costs] should be lowered by $39,714.59.

2 Tr 91. According to the Attorney General, recovery of the excluded costs (which, as noted earlier, Mr. McGarry estimated to be any amount above $24.64 per MWh) should occur in the present proceeding by simply adding them to Consumers' initially-proposed 2009 incremental cost of compliance with Act 295. See, Attorney General's initial brief, p. 15. That would increase the utility's initial figure to $117,973. Id. The Attorney General concludes by asserting that failing to make this change would ignore the fact that, while projected costs are used in computing transfer costs in the course of renewable energy plan cases, such computations undertaken in REP reconciliations--like this--"must be based upon actual costs." Id., p. 8.

In contrast, and as noted above, Consumers and the Staff each contend that applicable statutes and prior Commission orders support finding that the per MWh price at which renewable energy is transferred to a utility's PSCR process should not be limited to the LMP. See, Consumers' initial brief, pp. 13-14; Staff's initial brief, pp. 8-11. To find otherwise, they assert, would conflict with both the language and the intent of Act 295, while also ignoring Commission rulings dealing expressly with this issue. See, Id.

The ALJ agrees with Consumers and the Staff, and finds that the Attorney General's arguments with regard to computing the appropriate transfer price to be applied in this proceeding must be rejected. This finding is based upon the following three factors.

First, the Attorney General's claim that the transfer price must effectively be limited to the LMP conflicts with the specific provisions, as well as the overall intent, of Act 295. Section 47 of Act 295 allows the utility to recover the incremental cost of all renewable energy purchased in accordance with the Act's requirements, and further requires a portion of those costs to be recovered through the utility's PSCR process. See, MCL 460.1047. Of that Section, the most salient language with regard to this issue is that found in subpart (2)(b)(iv), which provides, in pertinent part, that:

> After providing an opportunity for a contested case hearing for an electric provider whose rates are regulated by the commission, the commission shall annually establish a price per megawatt hour. In addition, an electric provider whose rates are regulated by the commission may at any time petition the commission to revise the price. In setting the price per megawatt hour under this subparagraph, the commission shall consider factors including, but not limited to, projected capacity, energy, maintenance, and operating costs; information filed under section 6j of 1939 PA 3, MCL 460.6j; and information from wholesale markets, including, but not limited to, locational marginal pricing. This price shall be multiplied by the sum of the number of megawatt hours of renewable energy and the number of megawatt hours of advanced cleaner energy used to maintain compliance with the renewable energy standard. The product shall be considered a booked cost of purchased and net interchanged power transactions under section 6j of 1939 PA 3, MCL 460.6j. For energy purchased by such an electric provider under a renewable energy contract or advanced cleaner energy contract, the price shall be the lower of the amount established by the commission or the actual price paid and shall be multiplied by the number of megawatt hours of renewable energy or advanced cleaner energy purchased. The resulting value shall be considered a booked cost of purchased and net interchanged power under section 6j of 1939 PA 3, MCL 460.6j.

MCL 460.1047(2)(b)(iv) [Emphasis added]. In past orders, the Commission has labeled this price the "transfer price." Moreover, Section 49 of Act 295 provides that the Commission must, at least in the case of regulated utilities like Consumers, also review that price in the context of the utility's annual renewable energy plan's cost reconciliation proceedings. See, MCL 460.1049(3)(c). Read together, Sections 47 and 49 of the Act clearly indicate that the lowest level at which a utility's transfer price can

be set is the lower of the amount previously established by the Commission in the course of a utility's renewable energy plan process or the actual price paid by the utility.

Moreover, pre-approval of a schedule of transfer prices (as opposed to setting each price following the end of the period in question, as the Attorney General would have the Commission do) better comports with the overall intent of Act 295. As noted by the Staff, approving such prices in advance "provides the Company with a known number for planning its renewable energy resource procurement" required by the Act. Staff's initial brief, p. 9. This, the Staff further notes, "helps mitigate risk" associated with a fluctuating LMP market, and thus increases "the Company's ability to implement its goals" under Act 295. Id. It must therefore be concluded that the pre-set price established in the course of Detroit Edison's renewable energy plan process, and not the subsequently-determined LMP, is the appropriate floor for a utility's transfer price.

Second, prior rulings by the Commission expressly support reaching such a conclusion. For example, in the course of the Commission's August 25, 2009 order in Case No. U-15806 (which involved a review of The Detroit Edison Company's request for proposals regarding the potential supply of renewable electric capacity and energy), it was stated that:

> The Staff similarly asserts that there is no merit to the Attorney General's argument that the Commission lacks authority to establish transfer prices as a floor. Nevertheless, the Staff notes that while the June 2, 2009 order in this case, and the December 4, 2008 order in Case No. U-15800, addressed certain aspects of the transfer price, the issue of how the transfer price is to be used in the case of a third-party PPA has not been specifically addressed. The Staff therefore urges the Commission to clarify that at the time any PPA is approved by the Commission, the schedule of transfer prices most recently approved shall become the floor price for PSCR recovery. For each contract year, if the most recently approved annual transfer price is higher than the schedule of transfer prices for a particular contract, then the most recently approved annual transfer price would be recovered via the PSCR process. However, in the event that the contract price is less than the transfer price,

> the contract price would be the recoverable PSCR cost. This method would be applicable to renewable engineering, procurement, and construction contracts, or contracts for renewable energy systems that have been deployed by third parties for transfer of ownership to an electric provider, provider-owned projects, and third party PPAs.
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> * * *
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> The Commission agrees with the Staff's clarification and adds that it appears that the Attorney General fundamentally misunderstands the concept and operation of the transfer price in renewable energy procurement. Pursuant to Section 47(2)(b) of Act 295, the Commission is required to annually set a transfer price for renewables costs that will flow through the company's PSCR. The transfer price is simply a mechanism for estimating and allocating the reasonable and prudent costs for renewable energy between the PSCR and the REP surcharge, whether these costs are associated with renewable self-build projects, projects that are built by third-parties and transferred to the utility, or PPAs. As with any other PPA for electric power, ratepayers pay the reasonable and prudent costs set forth in the contract approved by the Commission and no more. There is no reason to view a PPA for renewable energy in any different fashion than, for example, the request by Consumers Energy Company for approval of a 20-year PPA for the purchase of nuclear power. See, March 27, 2007 [order] in Case No. U-14992. The primary reason for setting the transfer price schedule as a floor for any project or PPA is to provide the utility with a means of planning its renewables acquisition program to meet its renewable portfolio targets without exceeding the caps on the surcharge defined in Act 295.

August 25, 2009 order in Case No. U-15806, pp. 11-12 [Emphasis added].

Third, a careful reading of Section 49(3)(c) belies the Attorney General's claim that only actual expenses (not projected ones) are to be used when computing the transfer price in a renewable energy reconciliation case like this. Specifically, that provision indicates that the Commission shall establish "a price per [MWh] for renewable energy capacity and renewable energy" to be recovered through the PSCR process in the manner "outlined in Section 47(2)(b)(iv)," which is the renewable energy plan proceeding. Because the transfer price calculation performed in the plan case clearly provides for the use of both projected and actual expenses, and because the

same methodology is to be applied in the reconciliation case, all claims to the effect that only actual costs can be used are incorrect.

Assertions Regarding Double Recovery

MEC/ELPC began by asserting that certain land development costs and other expenses related to the company's initial activities concerning the construction of wind energy projects might have wound up being recovered both in base rates and through the REP process. Specifically, its witness (Mr. Sansoucy) expressed concern with regard to $1,963,890 in planning and early-stage development costs related to wind energy activities that were apparently incurred by Consumers through July 2008. See, 2 Tr 66-68.

Nevertheless, MEC/ELPC subsequently noted that if the utility is denied recovery of any REP-related costs arising prior to the October 6, 2008 effective date of Act 295, this issue essentially becomes moot. See, MEC/ELPC reply brief, p. 5. Thus, because this PFD recommends disallowing recovery of any capitalized expenses or their related carrying costs if incurred prior to the passage of Act 295, this issue need not be addressed.

Carrying Charges Related to Wind Generation

Finally, MEC/ELPC contends that "to faithfully implement the Commission's order [issued May 26, 2009 in Case No. U-15805] approving Consumers' renewable energy plan but not any actual costs until more is known," the Commission should defer approval of the carrying charges associated with all costs incurred for the utility's self-build wind energy projects until "the actual cost of [that] energy is known." MEC/ELPC reply brief, p. 3.

According to MEC/ELPC, because the company has yet to demonstrate that its proposed projects can generate renewable energy at a price that is "cost competitive with the Renewable Energy Purchase Agreements (REPAs) offered by private developers," there is no way to tell whether either (1) the expenses arising from Consumers' projects are actually reasonable and prudent, or (2) whether the utility's decision to effectively max-out its self-build allotment on those wind-energy projects was appropriate. Id., p. 4. MEC/ELPC therefore requests that the Commission either not approve the recovery of any construction work in progress for Consumers' self-build wind projects "until the Company shows the projects will generate energy at a reasonable and prudent cost," or simply rule that "actual costs for self-build wind [generation] will not be considered approved for a given project until the project comes on line and the all-in cost is known." Id.

Consumers responds by contending that all capital expenditures (and, thus the carrying costs arising from them) relating to its self-build wind energy projects "were a prudent and necessary part of implementing the [REP] approved by the Commission in its May 26, 2009 order in . . . Case No. U-15805." Consumers' reply brief, p. 8. In addition, the utility notes, there was no requirement in that order to "suspend activities undertaken or proposed to be undertaken in the implementation of the plan until a demonstration of the type proposed be [MEC/ELPC] occurred." Id. In fact, Consumers notes, although the Commission's December 4, 2008 order in Case No. U-15800 "specified the types of Engineering, Procurement, and Construction (EPC) contracts it expected to 'approve before they became effective,' . . . none of the capitalized expenses [at issue here] were the result of EPC contracts that required prior approval. Id., pp. 8-9. Consumers goes on to conclude that, because the capitalized expenses at

issue in this proceeding "amount to approximately 1% of the cost of the planned projects" and that the costs were incurred "before sufficient progress" had been made to revise the Company's [REP] estimates, it feels that the concerns expressed by MEC/ELPC regarding the reasonable and prudent cost of self-build wind energy are "greatly exaggerated." Id., p. 9.

While respecting the internal logic of the concerns expressed by MEC/ELPC, the ALJ finds that insufficient reason has been offered for withholding approval and recovery of the carrying charges at issue in this proceeding. While it is certainly possible that the total price of renewable capacity and energy provided by Consumers' self-build wind-power facilities could exceed that set forth in the REPAs received from various private developers, the one great unknown is whether those developers could actually have followed through on their respective proposals to achieve commercial operation at the initially-stated price. Because the record is devoid of any substantive evidence concerning those developers' past histories with regard to the provision of wind-generated power at the price suggested, the ALJ finds inadequate basis for recommending that the Commission refrain from approving recovery of the carrying charges sought in this proceeding, albeit as reduced in conformance with the rulings discussed above.

IV.

CONCLUSION

Based upon the foregoing, the ALJ recommends that the Commission issue an order finding that Consumers met its 2009 renewable portfolio standards, that the utilty's actual 2009 renewable energy expenses and revenues fell within the levels authorized

in Case No. U-15805, and that the company's claimed RECs should be approved in their entirety. Nevertheless, the ALJ also recommends that the Commission rule that: (1) any and all REP-related costs (as well as their associated carrying charges) incurred prior to the effective date of Act 295 should be excluded from recovery, (2) the 1.52 MW of capacity arising from the overhaul and upgrade of Hardy Unit 3 not be treated as requested by Consumers, and (3) the utility's suggested transfer price, in the amount of $44.80 per MWh, be approved for purposes of this proceeding.

Finally, it should be noted that any arguments or potential issues not specifically addressed in this PFD were deemed to be irrelevant to the ALJ's ultimate findings and conclusions.

MICHIGAN ADMINISTRATIVE HEARING SYSTEM
For the Michigan Public Service Commission

Mark Cummins

Digitally signed by Mark Cummins
DN: cn=Mark Cummins, c=US, email=cumminsm1@michigan.gov
Date: 2011.06.27 16:33:14 -04'00'

Mark E. Cummins
Administrative Law Judge

June 27, 2011
Lansing, Michigan